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Gag Orders and the Ultimate Sanction

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GAG ORDERS AND THE ULTIMATE SANCTION

I. INTRODUCTION

"Babykiller!" The media quickly and collectively branded a New Jersey teenager a "babykiller" for the murder of her newborn son.[1] The alleged acts of Amy Grossberg, a college freshman from a well-to-do family, became the focal point of the most sensationalized and publicized criminal case in Delaware history. Police reports state that Amy and her high school sweetheart, Brian Peterson, checked into a Comfort Inn motel shortly after midnight on November 12, 1996, where Amy gave birth to a healthy six-pound, two-ounce boy.[2] After the delivery, Brian put the baby in a plastic bag and tossed him into the trash.[3] Later that night, Amy returned to her dormitory room at the University of Delaware, and collapsed the next day from complications arising out of the delivery.[4] She was rushed to a hospital where doctors discovered she had recently given birth.[5] A search for the baby ensued, and police discovered the newborn's body in a dumpster behind the motel.[6] State autopsy reports concluded that the baby died of multiple skull fractures, sustained from blunt head trauma.[7]

The extensive media coverage of this first-degree murder case prompted Delaware Superior Court Judge Henry duPont Ridgely to issue a

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1. *See* Elizabeth Gleick, *Three Kids, One Death; They Were Happy and Well-Off. Why Did They Dump Their Baby Possibly After Crushing Its Skull?*, TIME, Dec. 2, 1996, at 69; Don Feder, *Fetal Homicide Should Be a Crime*, BOSTON HERALD, Jan. 3, 1997, (Editorial), at 29; Rudy Larini, *Accused Baby-Killer Pair Take a Step Toward Home*, STAR-LEDGER (Newark, N.J.), Jan. 23, 1997, at 13; Steve Marshall, *Teen Surrenders Amid Screams of 'Baby Killer!,'* USA TODAY, Nov. 22, 1996, at 3A.

2. Peter J. Sampson, *Teens Lose Motion to Influence Jury; Indictment Seen Near in Baby's Death*, RECORD (Bergen County, N.J.), Dec. 7, 1996, at A3. The defense disputed the fact that the baby was born healthy, contending that the baby was stillborn and had a severe brain defect. Doug Most, *Wyckoff Teens Prosecutor to Stay; No Violations Found in Judge's Gag Order*, RECORD (Bergen County, N.J.), Sept. 20, 1997, at A3.

3. *Id.*

4. *20/20: A Death in the Family* (ABC television broadcast, June 6, 1997).

5. *Id.*

6. *Id.*

7. *Id.*

gag order on November 21, 1996.[8] The gag order prohibited attorneys from speaking with the media, including television, newspapers, and magazines; however, the media was exempt from the gag order. Thus, the onslaught of negative publicity portraying the young teenagers continued.[9]

The nationally televised news show *20/20* presented a story from a different perspective—one that highlighted Amy's caring and humane side. On June 6, 1997, Barbara Walters interviewed Amy, her parents, and her attorney, Robert Gottlieb.[10] At the beginning of the show's segment, Ms. Walters acknowledged the gag order applied only to lawyers and investigators, not to Amy or her parents. Accordingly, under Mr. Gottlieb's direction, Amy and her parents talked about her background as a good student and camp counselor, her close relationship with her parents, and the productive use of her two-month experience in jail.[11]

During the interview, Mr. Gottlieb told Ms. Walters that "Amy should not have been charged. Amy is not guilty."[12] He continued, "it's never too late to do what is right based on the evidence. And it's only after time and over time that you really find out what a case is about. It's our hope that they'll take this opportunity and take a fresh look at the case."[13] In response to these statements, Judge Ridgely dismissed Mr. Gottlieb from the case for violating the gag order.[14] Thus, Mr. Gottlieb, who had been admitted to

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8. State v. Grossberg, No. 9611007818 (Del. Super. Ct. Nov. 21, 1996) (order limiting pretrial publicity) (on file with the *Loyola of Los Angeles Entertainment Law Journal)* [hereinafter Order].

9. *See generally* Diana Butler, *The Trap of Moral Relativism: The Recent Indictments of Two College Freshmen on Charges of Infanticide Bring Home the Great Need for a Unifying, Noncontextual Ethic*, L.A. DAILY NEWS, Dec. 15, 1996, (Viewpoint), at 1 (commenting on the ethically wrong choice made by Grossberg and Peterson for allegedly killing their newborn, despite their social advantages of being wealthy and educated); Leonard Pitts, Jr., *The Upper Crust Has its Own Barbarians*, TAMPA TRIB., Dec. 1, 1996, (Commentary), at 2 (noting that Grossberg and Peterson's race and financial status does not mean they automatically wear badges of morality); *20/20* (ABC television broadcast, June 6, 1997) (voicing concern of Mrs. Grossberg that Amy had been falsely portrayed in the media as a spoiled, rich kid).

10. Mr. Gottlieb was admitted to practice in this action *pro hac vice* on May 12, 1997. *See* State v. Grossberg, 705 A.2d 608, 611 (Del. 1997).

11. While incarcerated, Amy tutored prisonmates in their academic classes and "tried to be [as] productive as [she] could there." *20/20: A Death in the Family* (ABC television broadcast, June 6, 1997). Both Amy and Brian were released on $300,000 bail and live at their respective homes while awaiting trial. They wear electronic monitoring devices on their ankles. Doug Most, *Wyckoff Teens' Trial Put Off Experts: Delay Aids Defense*, RECORD (Bergen County, N.J.), Sept. 4, 1997, at L1.

12. *20/20: A Death in the Family* (ABC television broadcast, June 6, 1997).

13. *Id.*

14. *See Grossberg*, 705 A.2d, at 613. Mr. Gottlieb's admission was revoked on July 3, 1997. *See id.* at 608. Mr. Gottlieb had previously opined on a Philadelphia television station: "Amy didn't commit a crime." *Id.* at 6. Mr. Gottlieb lost his appeal of Judge Ridgeley's decision.

practice in Delaware *pro hac vice*, had his admission revoked less than three months before the beginning of his client's criminal trial. This action left Amy without her attorney of choice in a trial where her life was potentially at stake.[15]

Judge Ridgely's dismissal of Mr. Gottlieb raises a troublesome issue. While the public was conducting its own trial of Amy Grossberg, Mr. Gottlieb was expected to stand by idly in the face of a gag order and allow the media to sentence his client before her formal trial began. The court's gag order directly conflicted with Mr. Gottlieb's duty to zealously represent the interests of his client. This Comment examines how an attorney's duty of zealous representation can be reconciled with the courts' potentially crippling use of gag orders to achieve a fair trial. Part II briefly examines the constitutionality and application of gag orders. Part III analyzes whether an attorney's duty to zealously represent a client sometimes necessitates the violation of gag orders. Part IV discusses the importance of a defendant's right to counsel of choice, especially in capital punishment cases. Finally, Part V suggests alternative sanctions judges could impose when attorneys violate gag orders—sanctions less draconian than removing the defendant's attorney of choice in a capital punishment case.

II. BACKGROUND ON GAG ORDERS

Public interest in courtroom drama has reached an all-time high. Interest in the law is no longer confined to the upper echelon of educated individuals. Sensationalized criminal trials have permeated our popular culture. There are news programs, magazines, and even a cable television channel devoted to around-the-clock coverage of legal issues.[16] The media provide continuous and up-to-date coverage of cases pending in the courthouses of America, and there is an abundance of newsworthy crimes to fuel this coverage. In the wake of O.J. Simpson's "Trial of the Century,"[17]

See Gottlieb v. State, 697 A.2d 400 (Del. 1997).

15. Delaware's capital punishment laws are among the toughest in the country. Juan Forero, STAR-LEDGER (Newark, N.J.), Nov. 22, 1996, at 1. Delaware legislators began toughening these laws in 1991 after a sensational murder-robbery led to public demand for stronger legislation. *See id.* Under a 1994 amendment, the intentional slaying of children under the age of 14 by someone at least four years their senior warrants the death penalty. *See* DEL. CODE ANN. tit. 11, § 4209(e)(1)s (1997). Currently, there are 22 separate circumstances that qualify a crime for death. *See id.* § 4209(e)(1)a–v.

16. *See* Stephen D. Easton, *Whose Life Is it Anyway?: A Proposal to Redistribute Some of the Economic Beenfits of Cameras in the Courtroom from Braodcasters to Crime Victims*, 49 S.C. L. REV. 1, 17–18 (1997) (noting the extensive coverage of trials provided by cable television networks such as CNN and Court TV, as well as television news magazines *Inside Edition*, *Current Affiar*, *48 Hours*, and *Prime Time Live*).

17. *See* Laurie L. Levenson, Foreword, *The Sound of Silence: Reflections on the Use of the*

public interest has been met by the well-publicized case of Theodore Kaczynski, the "Unabomber,"[18] and the trials of Timothy McVeigh, the "Oklahoma City Bomber,"[19] and Louise Woodward, the "English Nanny."[20] The alleged perpetrators became overnight "celebrities" well before their trials began. Anyone who watches the news, reads the newspaper, or discusses current events with friends or acquaintances knows the details of these heinous crimes. Such intense media scrutiny, however, has a potentially deleterious effect on the accused's right to a fair trial.

A. Gag Orders: Who Is Bound?

Although an unfair trial is not inevitable in the face of extensive prejudicial publicity, such publicity can threaten a defendant's chance of getting a fair trial.[21] Herein lies the conflict between the media's First Amendment right to free press and a defendant's Sixth Amendment right to a fair trial.[22] In an effort to protect a defendant's right to a fair trial by an impartial jury, some judges issue gag orders.[23] Generally, there are two

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Gag Order, 17 LOY. L.A. ENT. L.J. 305, 306 n.4 (1997) (noting that there has been at least five "Trials of the Century" in Los Angeles alone in recent years) (citing Rufo v. Simpson, No. SC031947, 1997 WL 53038, at *1 (Cal. Super. Ct. Feb. 10, 1997); People v. Simpson, No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995); People v. Menendez, No. BA068880, 1996 WL 342092, at *1 (Cal. Super. Ct. July 2, 1996); People v. Williams, 46 Cal. App. 4th 1767 (Cal. Ct. 1996); United States v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993); People v. Powell, No. BA035498, (Cal. Sup. Ct. Apr. 29, 1992)).

18. *See, e.g.*, Mark Gladstone, *U.S. Indicts Kaczynski Over Fatal Unabomber Attack in New Jersey*, L.A. TIMES, Oct. 2, 1996, at A17.

19. *See, e.g.*, *The McVeigh Verdict Case History: It Started at 9:02 a.m.*, L.A. TIMES, June 3, 1997, at A23.

20. *See, e.g*, Elizabeth Mehren, *From British Au Pair to Global Media Darling: Reporters Focus on Louise Woodward, While Matthew Eappen's Parents Face the Court of Public Opinion*, L.A. TIMES, Nov. 18, 1997, at E3.

21. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976).

22. The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend VI. Scholars often write about the "classic struggle" between an accused's Sixth Amendment right to a fair trial by an impartial jury with the media's First Amendment right to free speech and free press. *See generally* Richard G. Elliott, Jr., *Access to Pretrial Criminal Proceedings: The First Amendment vs. The Sixth Amendment*, 15 DEL. LAW. 14 (1997) (discussing the "classic struggle" between two fundamental rights: "[R]ights protecting the media and rights protecting the accused, a struggle which at the pretrial stage the media usually win.").

23. Other devices judges may use to mitigate the effects of prejudicial publicity include: changing the venue of the case; continuing the trial to wait for public interest to subside; rigorous voir dire of potential jury members; sequestration of the jury; and jury instructions that direct jurors to disregard inadmissible evidence and to decide the case exclusively upon the facts heard at

forms of gag orders: (1) gag orders directed at the press; and (2) gag orders directed at trial participants, such as attorneys, parties and witnesses.[24] When obeyed, gag orders effectively bar individuals or entities from disseminating information about the case to the public and potential jurors.[25]

Gag orders directed at restricting the media are almost always deemed unconstitutional prior restraints.[26] As the United States Supreme Court stated in *Nebraska Press Ass'n v. Stuart*,[27] "prior restraints on speech and publication are the most serious and least tolerable infringement[s] on First Amendment rights."[28] This heavy presumption of invalidity leads many judges to avoid targeting the press in favor of targeting trial participants, such as parties and their attorneys. In addition, judges often rely on the status of attorneys as "officers of the court" to justify stricter regulations of their conduct both in and out of court.[29] Until the Supreme Court specifically addresses the constitutionality of gag orders on trial participants, judges can be expected to continue directing these orders toward attorneys rather than the press.

For instance, Bruce Cutler, defense attorney for organized crime figure John Gotti, was convicted in a Federal District Court in New York of criminal contempt for violating a court order prohibiting extrajudicial statements by lawyers.[30] Cutler was the first lawyer to face trial on criminal

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trial. *See Nebraska Press Ass'n*, 427 U.S. 563–64. The effectiveness of these remedies in assuring a fair trial is outside the scope of this Comment, but usually turns on facts particular to the case at issue. Judge Ridgely asserted that he had "carefully considered the lesser alternatives traditionally available" to limit pretrial publicity. *See* State v. Grossberg, 705 A.2d. 608, 614 (Del. 1997). The judge went on to say:

> With the national publicity of this case, a change of venue would serve no purpose. Nor would postponement of the trial because of the likelihood of continuing publicity. Neither voir dire nor jury instructions can address in a sufficient way the threat posed by extrajudicial statements which will materially prejudice the trial.

Id.

24. *See* Lester Porter, Jr., Note, *Leaving Your Speech Rights at the Bar*—Gentile v. State Bar, *111 S. Ct. 2720 (1991)*, 67 WASH. L. REV. 733, 738 (1992).

25. *See* Howard D. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 288–89 (1982).

26. *See* Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311, 312 (1997) ("*Nebraska Press* has been treated as an almost complete bar to gag orders on the press."). *Id.* at 312 n.4.

27. 427 U.S. 539 (1976). In *Nebraska Press*, the Court reversed the Nebraska Supreme Court's affirmation, slightly modified, of a lower court's order that restrained the news media from publishing or broadcasting confessions made by the defendant to law enforcement officers. *See id.* at 541–42, 567–70.

28. *Id.* at 559.

29. *See* Chemerinsky, *supra* note 26, at 312.

30. United States v. Cutler, 58 F.3d 825 (2d Cir. 1995) (involving a gag order based on a local court rule).

contempt charges for talking to the media.[31] He spoke repeatedly to the press at a time when public interest in the case was at its height, despite numerous admonitions from the judge.[32] Cutler was sentenced to ninety days of house arrest and 600 hours of non-legal community service, and was suspended from practicing law in the Eastern District of New York for 180 days.[33]

Similarly, in the Amy Grossberg case, Judge Ridgely directed his Order Limiting Pretrial Publicity to trial participants.[34] Because restraints on trial participants are consistently upheld,[35] Judge Ridgely's gag order is most likely a valid means for mitigating the effects of prejudicial pretrial publicity. However, Judge Ridgely's gag order is problematic because it was issued *after* the initial onslaught of prejudicial pretrial publicity. Both local and national media presented only the graphic and disturbing reports from police and prosecutors. Thus, the timing of Judge Ridgely's gag order effectively impeded defense counsel's opportunity to counter the adverse effects of this negative publicity. Even more problematic was the sanction Judge Ridgely imposed for violation of his gag order—a violation intended to "level the playing field" and promote fairness in media coverage.

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31. Andrew Blum, *Left Speechless: Out of Court, Defense Lawyers Feel a Chilling Breeze*, NAT'L L.J., Jan. 18, 1993, at 1.

32. On December 20, 1990, Judge Glasser "admonished" the parties to comply with the local rule by "try[ing] the case only in the courtroom and not in the press." *Cutler*, 58 F.3d at 829. Immediately following this hearing, Mr. Cutler held a press conference outside the courthouse. *Id.* Judge Glasser reiterated his "admonition" to comply with the local rule. *Id.* Mr. Cutler continued ignoring these orders by making comments in all major New York dailies, as well as television shows, such as *60 Minutes*. *Id.* at 830. For the third time, Judge Glasser ordered the parties to comply with the local rule. *Id.* To no avail, New York's dailies and television news programs continued to run stories about Gotti. *Id.* Finally, Cutler was charged with, and found guilty of, criminal contempt for violating these orders. *Id.* at 831–32.

33. *Cutler*, 58 F.3d at 832.

34. *See* Order, *supra* note 8, at 2. The Order reads in relevant part:

> (1) *Counsel for the State and counsel for Defendants are precluded from public comment* about these cases except in accordance with Rule 3.6 of the Delaware Lawyers' Rules of Professional Conduct . . . . (3) Counsel for the State and Defendants shall promptly make all . . . persons assisting or associated with the prosecutors or defense in these cases aware of this Order.

Id. at 2 (emphasis added). Grossberg's first attorney, Charles M. Oberly III, had agreed that an order limiting pretrial publicity was necessary to prevent a "substantial likelihood of material prejudice to the parties' right to a fair trial." Order, *supra* note 8, at 1. Robert Gottlieb substituted in as Ms. Grossberg's attorney in May and, by its terms, was bound by the gag order. *See id.*

35. Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 88 n.108 (1996).

B. The Relationship of Gag Orders to Trial Publicity Rules

Robert Gottlieb's dismissal was based upon his alleged violation of Judge Ridgely's gag order. Judge Ridgely's court order instructed parties to conform with Delaware's Rule of Professional Conduct 3.6 on trial publicity.[36] Delaware's provision is a verbatim adoption of the American Bar Association's ("ABA") 1983 version of Model Rule 3.6 on trial publicity.[37] The trial publicity rule prohibits a lawyer from making extrajudicial statements that a "reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding" ("substantial likelihood standard").[38] The rule also expressly prohibits lawyers from stating their opinion as to the guilt or innocence of a defendant in a criminal case.[39]

Trial publicity rules, such as Delaware's, do not carry the same heavy presumption of unconstitutionality as do prior restraints of the press, although they also operate as anticipatory restrictions on speech.[40] The different presumptions of constitutionality afforded prior restraints and trial publicity rules flow from the different methods of challenge available under each speech restriction.[41] A party who violates a trial publicity rule is permitted to challenge the validity of the rule itself.[42] Prior restraints, however, must be challenged before a violation occurs.[43] Accordingly, as trial publicity rules are subject to more generous review than prior restraints, they are not similarly encumbered by a heavy presumption against their constitutionality. This allows judges who issue gag orders instructing attorneys to follow the local trial publicity rule to, in effect, impose permissible prior restraints on the speech of the parties.

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36. *See* Order, *supra* note 8, at 1.

37. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).

38. DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1998).

39. *Id.* at 3.6(b)(4) ("A statement . . . is ordinarily likely to [have a substantial likelihood of materially prejudicing a trial if] the statement relates to . . . any opinion as to the guilt or innocence of a defendant . . . .").

40. Esther Berkowitz-Caballero, Note, *In the Aftermath of* Gentile*: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 548 n.305 (1993) ("Trial publicity rules differ from prior restraints in that they do not attempt to prevent the articulation of specific speech. Also, the constitutionality of a trial publicity rule may be challenged by one prosecuted for violating the rule, whereas prior restraints must be challenged before they are violated.").

41. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975).

42. *See id.*

43. *See id.*

The critical examination a judge is expected to engage in before issuing a gag order leads some commentators to suggest using gag orders to avoid the uncertainty associated with Rule 3.6.[44] Gag orders can be issued in individual cases and tailored with the specificity necessary to minimize the danger of overbreadth.[45] The benefit of using gag orders to prevent unnecessary chilling of speech is nullified, however, when the terms of the gag order simply echo those of Rule 3.6. Judge Ridgely took no steps to narrowly tailor the gag order in *Grossberg*.[46] Instead, he directed counsel to comply with the local trial publicity rule, which was based on the old Model Rule 3.6.[47]

C. The Revision of Model Rule 3.6

The Supreme Court examined the free speech rights of lawyers in 1991 in the landmark case *Gentile v. State Bar of Nevada*.[48] Although *Gentile* did not involve a court order, defense attorney Dominic Gentile was charged with violating a local Nevada rule fashioned after the ABA's Model Rule on trial publicity.[49] Within hours of his client's indictment, Gentile held a press conference, stating, "[T]he evidence will prove . . . that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him."[50] Gentile claimed that his statements were necessary to

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44. *See* Mark Tuft, *Trial Publicity—Before, During and After Trial*, 537 PRACTICING L. INST. 7, 30 (1995) (contrasting broad ethical restrictions to gag orders whereby judges must "explore alternatives before restraining speech and tailor [gag] orders to the specific circumstances of each case"); *see also* Gabriel G. Gregg, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1363–64 (1996) (asserting that gag orders are the most powerful and effective tools in limiting prejudicial attorney speech); Porter, *supra* note 24, at 747 (noting that ad hoc gag orders are less restrictive of speech than Model Rule 3.6).

In theory, because of the potential chilling effect associated with gag orders, judges are not to issue gag orders without first considering less restrictive alternatives to curbing the effects of pretrial publicity. Changes of venue, voir dire, continuances, and jury sequestration are some procedures judges should consider as alternatives that don't impinge on attorney free speech rights as severely as gag orders. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563–64 (1976). When gag orders are finally issued then, it is assumed the issuance was made after serious consideration of all factors involved. In practice, however, judges can easily issue gag orders with a stroke of the pen.

45. *See* Porter, *supra* note 24, at 747.

46. *See* Order, *supra* note 8, at 2.

47. *See id.*

48. 501 U.S. 1030 (1991).

49. *See id.* at 1033.

50. *Id.* at 1059. The local rule in effect at the time prohibited statements of opinion as to the guilt or innocence of a criminal defendant. *Id.* at 1061. His client was charged with stealing large amounts of cocaine and travelers' checks. *Id.* at 1039. Ultimately, he was indicted. *Id.* at 1033.

combat the prejudicial and pervasive publicity surrounding the case during the period before his client's indictment.[51]

In a complex opinion, a divided Court upheld the constitutionality of the "substantial likelihood standard," overturned Gentile's sanctions, and held Nevada's local rule void for vagueness.[52] Chief Justice William Rehnquist suggested that lawyer speech in pending cases be regulated under a standard less demanding than the "clear and present danger" standard established for regulation of the press in *Nebraska Press Ass'n*.[53] In support of this more relaxed standard, Chief Justice Rehnquist noted the fiduciary responsibility of attorneys "not to engage in public debate . . . that will obstruct the fair administration of justice."[54] Thus, the more deferential standard espoused by Rehnquist and four other members of the Court rested on the assumption that attorneys, as opposed to the press, would regulate themselves. In contrast, Justice Kennedy argued that "substantial likelihood" must be measured by the same strictures as "clear and present danger."[55] Thus, while nine Justices adopted the "substantial likelihood standard," the Court could not agree on its meaning. However, because four Justices joined with the Chief Justice, the speech of lawyers representing clients in pending cases is regulated by a standard less demanding the the "clear and present danger" standard.[56]

The controversial *Gentile* decision sparked ABA revisions of Rule 3.6 in 1994.[57] While maintaining the "substantial likelihood standard," the ABA made a number of significant modifications to the previous 1983 version of Rule 3.6. The amended rule allows lawyers to make statements which a "reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[58] Due in part to *Gentile*, this amendment recognizes situations where it is necessary for lawyers to respond to an adversaries' public statements in order to assure a fair trial. Two of the modifications are especially relevant to the Grossberg matter.

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51. *Id.* at 1064.

52. The Nevada local rule contained a "safe harbor" provision that permitted a lawyer to state, without elaboration, the general nature of the defense. As a result, Gentile was misled into thinking that he could give his press conference without fear of discipline. *Id.* at 1048–49.

53. *Id.* at 1074.

54. Gentile, 501 U.S. at 1074 (quoting *Nebraska Press*, 427 U.S. at 601 n.27).

55. *See id.* at 1038–39.

56. *See id.* at 1074.

57. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994).

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994).

First, the ABA introduced a "right of reply" provision that acts as a safe harbor within which lawyers may "make a limited response to particularly egregious publicity without fear of sanction."[59] Although the language of Rule 3.6 suggests that the right of reply is limited to rebutting only specific instances of publicity, the provision actually incorporates a flexible sliding scale standard.[60] Thus, as the level of prejudicial publicity increases, the scope of response the lawyer is entitled to make will also increase.[61]

Second, the ABA made a subtle change by removing the list of presumptively prejudicial statements enumerated in Rule 3.6 from the textual portion of the Rule to the Comment section.[62] This change reflects the ABA's concern that the apparently exhaustive nature of the list, placed in the text of the Rule, might influence courts to automatically punish violative statements without determining whether the statements actually had a prejudicial effect.[63] Delaware's trial publicity rule, however, still resembles the 1983 version of Rule 3.6 which contains the list of statements enumerated as enforceable examples of likely violations.[64]

Judge Ridgely was overly influenced by the list. Delaware's trial publicity rule lists "any opinion as to the guilt or innocence of a defendant" as a statement ordinarily likely to materially prejudice an action.[65] Recognizing this, Judge Ridgely stated in his Order to dismiss Gottlieb that "it is plain [Mr. Gottlieb's statements during the "20/20" interview]

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59. Gregg, *supra* note 44, at 1382 (1996). The Model Rules provide:

> A lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer of the lawyer's client. [Such a] statement . . . shall be limited to such information as is necessary to mitigate the recent adverse publicity.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994).

60. *Id.*

61. *Id.*

62. Under the 1983 version of Model Rule 3.6, subsection (b) enumerated several types of statements which were considered "ordinarily likely" to have a substantial likelihood of materially prejudicing an adjudicative proceeding. Such statements included those that related to:

> (1) "[T]he character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness; . . .
>
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
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> (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.6(b)(1), (4)–(5) (1983).

63. Gregg, *supra* note 44, at 1380.

64. *See* DELAWARE LAWYERS' RULE OF PROFESSIONAL CONDUCT Rule 3.6(b)(1–5) (1998).

65. DELAWARE LAWYERS' RULE OF PROFESSIONAL CONDUCT Rule 3.6(b)(4) (1998).

convey[ed] his personal opinion as to the innocence of defendant Grossberg."[66]

Like Mr. Gentile, Mr. Gottlieb also publicly announced the innocence of his client in order to counter the negative publicity stifling the case. Although it might be argued that Mr. Gottlieb's contention that Amy was innocent of the crime had a "substantial likelihood of materially prejudicing an adjudicative proceeding,"[67] it is unlikely that Mr. Gottlieb's statement actually had such an effect. For most criminal cases, this is because the public *expects* such statements to be made by a criminal defendant's advocate. Therefore, on a practical level, it is ordinarily *unlikely* that Mr. Gottlieb's statement would potentially prejudice the potential jury pool in Amy's favor.

Furthermore, studies suggest that pretrial publicity will usually have no impact on a juror. For instance, to have an impact, the juror

> must be exposed to prejudicial press coverage, that juror must be biased by the coverage, and the juror must retain the bias against the defendant from the date the information is published to the trial date, which may be many months later. Finally, the juror would have to carry the bias through such safeguards as *voir dire* and admonishments from the bench.[68]

The likelihood that attorneys' speech will not prejudice jurors and trials was underscored by the Court in *Mu'Min v. Virginia*.[69] Substantial publicity surrounded the capital murder trial of Mu'Min, and the media disseminated details of the crime and numerous items of inadmissible, prejudicial information in news stories spanning over several months. Despite eight of the twelve jurors admitting to pretrial publicity exposure, the Court held that "the publicity did not rise even to a level requiring questioning of individual jurors about the content of publicity."[70] Similarly, it is doubtful that Mr. Gottlieb's abbreviated, general comments made three months before trial, rose to the level of creating a "substantial likelihood of materially prejudicing" the case.[71]

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66. Order, *supra* note 8, at 11.

67. DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1998).

68. Elliott, *supra* note 22, at 16–17.

69. 500 U.S. 415 (1991).

70. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1039 (1991) (distinguishing the case from the Court's *Mu'Min* decision).

71. *Id.*

D. Unequal Enforcement of Gag Orders

The *Grossberg* case illustrates the growing problem of unequal enforcement of gag orders. The problem lies in the language of statutes based on the former Model Rule 3.6 that allowed the broad, discretionary application of the amorphous "substantial likelihood of material prejudice" standard.[72] As Justice Kennedy wrote in *Gentile*, the standard's imprecision creates the potential for selective enforcement that is of "particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State."[73]

For example, defense attorney Gentile was disciplined for holding a press conference, but the prosecutor was not disciplined for holding his own press conference.[74] Similarly, Judge Ridgely dismissed defense attorney Gottlieb for violating the gag order, while he ruled that prosecutor Peter LeTang did not violate the gag order when he granted an interview to a newspaper.[75] The inequality of these decisions is amplified because Mr. LeTang granted the interview after Gottlieb's dismissal, and knowing of the possible consequences. But, Mr. LeTang was not punished in any way even though his conduct flew in the face of Judge Ridgely's order. Such discriminatory enforcement paves the way for judicial abuse, which is especially dangerous and objectionable when a defendant faces the death penalty. Failure of judges to avoid furthering the inequity of gag order enforcement may very well lead to continued and purposeful violations of gag orders by defense attorneys as the need to balance harmful publicity increases.

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72. *See* Berkowitz-Caballero, *supra* note 40, at 530. ("Fundamentally, the standard affords judges too much discretion to determine which comments, under what conditions, would create a substantial likelihood of material prejudice.").

73. *Gentile*, 501 U.S. at 1051.

74. *See* Berkowitz-Caballero, *supra* note 40, at 531.

75. Most, *supra* note 2, at A3. In response to a motion by Grossberg's defense counsel, John S. Malik, seeking sanctions of Mr. LeTang or, in the alternative, reinstatement of Mr. Gottlieb as Grossberg's lead attorney, Judge Ridgely decided that a hearing on the motion was "plainly unnecessary." *Id.* The judge called for an end to the accusatory pleadings. *See id.*

III. ZEALOUS REPRESENTATION

A. A Presumption of What?

Theoretically, under our legal system, defendants are presumed innocent until proven guilty. In reality, and particularly with highly publicized cases, it often seems that defendants are cloaked with a presumption of guilt until proven innocent.

Media coverage of a high-profile criminal trial characteristically unfolds as follows: (1) the media learns of the occurrence of a sensational murder; (2) the public learns of the murder through media reports; (3) the police and prosecutors begin issuing statements regarding the facts and circumstances surrounding the murder; (4) a suspect is officially charged with the murder; (5) the media runs stories about who the suspect is, what the suspect looks like, the suspect's occupation and family life, and the suspect's alleged role in the murder; (6) the public devours this new information voraciously; and (7) the judge presiding over the case issues a gag order in an attempt to protect the defendant and prevent more prejudicial information from reaching the potential jury pool.

Often, a gag order benefits a defendant because the flow of damaging information is arrested. In the case of Amy Grossberg, however, prejudicial information continued to flow because the media, immune from the gag order, continued their stories on Amy Grossberg and her allegedly murderous conduct. The details of Amy's alleged acts became engrained in the minds of the public as news entities insisted on referring to Amy each time a new story of a teenage girl abandoning her newborn was told.[76] Reporters relayed the stories as if child abandonment or infanticide was raging throughout young America as a new epidemic, with Amy having been the original carrier.

Prosecutor LeTang and Amy's original lead attorney, Charles Oberly III, both agreed that a gag order would be necessary to promote a fair trial. It is doubtful, however, that Mr. Oberly would have agreed to a gag order

76. *See, e.g., Woman Leaves Newborn in Toilet*, YORK DAILY REC., July 15, 1997 (reporting that a 16-year-old girl who gave birth while sitting on a bus terminal toilet, then walked away and left the baby for dead). Another young woman horrified millions as she allegedly gave birth at her high school prom, leaving the baby for dead in a trash can, and then returning minutes later to the dance floor. *See* Margaret Carlson, *Prom Nightmare; A Dead Baby in the Wastebasket, A Debate Gone Away*, TIME, June 23, 1997, at 42. In another case, a USC student allegedly gave birth in her dormitory room, leaving the newborn for dead in a campus dumpster. *See* Barbara Ehrenreich, *Where Have All the Babies Gone?*, LIFE, Jan. 1998, at 68.

had he known the media would continue to fuel the fire against his client and that he would be powerless to extinguish it. Mr. Oberly could not have foreseen the rash of teenagers disposing of their babies in ways reminiscent of Amy's alleged acts and the subsequent reporting by the media. The sheer magnitude of continuing negative publicity surrounding the *Grossberg* case was unpredictable. It is all the more compelling that Amy chose Mr. Gottlieb to represent her because he would be qualified to protect her from the media's accusations. Thus, when *20/20* requested an interview, it was arguably a necessary action by Mr. Gottlieb to take; the best one in his client's interests.

B. An Indictment Isn't Just an Indictment Anymore

Technically, an indictment is "a public statement by a prosecutor that the government has amassed enough evidence to try a suspect for a crime."[77] The public often perceives an indictment as a strong indication of a suspect's guilt. In such an atmosphere, effective representation may dictate that counsel defend a client not only against formal charges in court, but also against the "frequently more debilitating innuendo and unsubstantiated charges made in the media."[78] Moreover, when an indictment is well-publicized, it is unjust to *require* silence on the part of defense attorneys. Defense lawyers often face an uphill battle to reinstate their clients' constitutionally guaranteed presumption of innocence. Speaking to the media is frequently their weapon of choice.

A defendant's presumption of innocence is difficult to sustain in light of official police and coroner reports. When these reports are coupled with frequent leaks to the press of information potentially prejudicial to defendants, it follows that a defense attorney should have media access to publicly promote his or her client's innocence.[79] Without such access, the defense attorney operates at a disadvantage, despite the prosecutor's burden of proof. Uncontested, a potential jury pool enters the judgment process knowing only the facts supporting an indictment in a very public and sensationalized case.

Still, the mere issuance of an indictment does not justify a lawyer's violation of the gag order. The system contains "judicial and constitutional protections designed to counteract the 'presumption of guilt' that the indictment may engender."[80] The judicial and constitutional protections

77. Berkowitz-Caballero, *supra* note 40, at 532.

78. *Id.* at 533.

79. *Id.* at 534.

80. Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech,*

include the prosecutor's burden of proof and the defendant's privilege against self-incrimination.[81] When public interest in a case is intensified, however, these protections are not sufficient to preserve a defendant's right to a fair trial.

C. What Constitutes "Zeal?"

A defense attorney's primary duty is to represent their clients zealously within the bounds of the law.[82] The concept of "zealous representation," however, is not clearly defined. Equally vague is the "within the bounds of law" limitation. The ambiguity causes defense attorneys to continually confront the dilemma of whether to forego measures beneficial to their clients or to engage in potentially criminal conduct.[83]

Attorneys, like Mr. Gottlieb, must weigh the risk of conducting themselves according to their best judgment to help their clients against the adverse consequences that could flow from taking such actions.[84] Some lawyers even believe they have an ethical obligation to engage in "borderline conduct" when they believe that their intended conduct is ultimately lawful and beneficial to the client.[85] Moreover, criminal defendants may doubt their attorneys' commitment to their cause if they take a passive stance to the prosecutor's more aggressive undertaking of the case.[86]

Judicially imposed limitations on what attorneys may permissibly do to further their clients' interests complicate the ability of defense attorneys to effectively carry out the duty of zealous representation. The gravity of a case should influence "both the scope of permissible advocacy and what lapses of decorum are excusable."[87] Attorneys fighting to keep their clients

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69 S. CAL. L. REV. 1627, 1650 (1996).

81. *Id.*

82. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Rule EC 7-1 (1985).

83. *See* Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 689 (1991) (asserting that "[t]he ethical codes give no guidance as to whether the duty of 'zealous representation' requires an attorney to engage in conduct approaching the line of criminality, whether an attorney must refrain from such conduct, or whether an attorney has discretion to choose his course of conduct"); *see also* Cole & Zacharias, *supra* note 80, at 1628 n.6 (noting that "[t]he typical adversarial view of lawyers is that they generally should engage in whatever legal behavior will benefit their clients because doing so enhances client trust, promotes the sharing of confidences and improves the lawyers' contribution to truth seeking in an adversary system").

84. *See* Green, *supra* note 83, at 707.

85. *Id.* at 709.

86. *See* Cole & Zacharias, *supra* note 80, at 1651.

87. Louis S. Raveson, *Advocacy and Contempt—Part II: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743, 823 (1990) [hereinafter Raveson, Part II].

from being executed or sentenced to death row should be permitted greater leeway of advocacy without fear of contempt, than counsel challenging traffic tickets or even armed robberies.[88] In the *Grossberg* matter, it follows that Mr. Gottlieb should have been afforded the greatest latitude in his advocacy efforts on behalf of Amy. Instead, he was removed prematurely at the outset of the case as a result of statements made within the scope of his zealous representation.[89]

IV. DEFENDANT'S RIGHTS

A. Defendant's Right to Private Counsel

Under due process requirements, criminal defendants are constitutionally guaranteed the right to effective counsel.[90] This right encompasses the right to choose private counsel which in turn, necessarily implicates a right to choose the most effective, zealous advocate available rather than a passive defense attorney.[91] After all, the rights delineated in the Sixth Amendment were meant to "equalize the balance of power in the criminal process by granting the defendant an indispensable shield against the natural advantage the prosecution enjoys in a criminal trial."[92]

Considering the high stakes involved in a capital punishment trial when a case is bombarded with intense media coverage, the case should be treated differently from other criminal trials. As Justice Clark stated in *Irvin v. Dowd*, "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ."[93] It is also "not requiring too much" to permit capital defendants, like Amy Grossberg, to be represented by an attorney in whom they have confidence and trust. Indeed, the purpose of the effective assistance guarantee, as stated in *Strickland v. Washington*,[94] is to ensure a fair trial for defendants. After much consideration, the Grossbergs chose Mr. Gottlieb as lead counsel perhaps because they believed he would provide her with a solid defense and ensure a fair trial, despite the

88. *Id.* at 824.

89. *See* discussion *supra* note 10.

90. *See* Reece v. Georgia, 350 U.S. 85, 90 (1955) (holding that the right to counsel means the right to *effective* assistance of counsel).

91. *See generally* Glasser v. United States, 315 U.S. 60, 69–70 (1942).

92. Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 36 (1991).

93. Irvin v. Dowd, 366 U.S. 717, 728 (1960).

94. 466 U.S. 668, 689 (1984).

heightened public passion surrounding her case. However, a defendant's right to retain an attorney of choice is not absolute.[95] The defendant's freedom to choose counsel is limited by a court's power to balance the defendant's right to retain counsel of choice against the interests of judicial integrity and efficiency.[96] This power allows the court to restrict a defendant's right to accept appointed counsel or to disqualify retained counsel.[97] Where the death penalty is involved, however, judges should not have the authority to dismiss counsel without substantial cause, and should be subjected to the strictest appellate review.

A defendant's choice of counsel, even one admitted *pro hac vice*, cannot be denied arbitrarily.[98] The right to choose counsel gives defendants the ability to select an attorney they believe will best represent their interest, thereby preserving the integrity of the criminal proceedings.[99] This aspect of the right to counsel also respects the individual defendant's interest, as a matter of personal autonomy, in making critical decisions concerning the course of the criminal defense.[100]

B. Right to a Genuinely Fair Trial

All criminal defendants have the right to be tried by an impartial jury.[101] In *Sheppard v. Maxwell*,[102] the Supreme Court reversed a conviction because the press had shown no responsible concern for the constitutional guarantee of a fair trial.[103] Further, the Court stated that:

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95. *See* J. David MacCartney, Jr. & Lisa A. MacVittie, *Right to Counsel*, 80 GEO. L.J. 1341, 1348 (1992).

96. *See id.*

97. *See id.*

98. *See* United States v. Alvarez, 816 F.2d 813 (1st Cir. 1987) (deciding that defendant's rights had been violated because he did not have *pro hac vice* counsel of choice); *see also In re* Cooper, 821 F.2d 833, 843 (1st Cir. 1987) (stating that "due deliberation should be given before taking the extraordinary step of depriving Cooper of his counsel of choice"); Cooper v. Hutchinson, 184 F.2d 119, 123 (3d Cir. 1950) (holding that arbitrary removal of counsel admitted *pro hac vice* would deprive accused of his constitutional rights).

99. *See* Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 441–42 (1993).

100. *Id.*

101. U.S. CONST. amend. VI. This provision provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel." U.S. CONST. amend. VI.

102. 384 U.S. 333 (1966).

103. *Id.* Samuel Sheppard, a doctor, was charged with bludgeoning his pregnant wife to death in their home. *See id.* at 335–36. Three days after the murder, newspapers began running headlines about this story. *Id.* at 338. These stories focused on Sheppard's reluctance to take lie detector tests, his rumored extramarital affairs, and inconsistent recollection of events on the night of the murder. *See id.* at 338–42. By the time trial began, the *Sheppard* case had been covered

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.[104]

There are vital social interests served by the free dissemination of information, and attorneys are often the only people in a position to provide the public with accurate, critical, and timely information about the criminal justice process. If there were no limits on the flow of information, the protective effect of legal decorum would be effectively nullified.[105] Gag orders that act as broad restrictions on speech, however, don't serve the purpose of protecting legal decorum. Instead, they operate to prevent defendants and their counsel from engaging in public response to negative press and in turn, from participating in a fair trial.[106] On the other hand, gag orders, habitually enforced against capital defendants after the prosecution has had its opportunity to publicly address its position, operate to nullify a defendant's right to a fair trial.

C. Opportunity for Interlocutory Appeal

Mr. Gottlieb was not given an appeal of his dismissal.[107] Gottlieb had filed a motion asking Judge Ridgely to reconsider his ruling, but Ridgely denied the motion.[108] Mr. Gottlieb subsequently appealed to the Delaware Supreme Court, requesting a review of Judge Ridgely's decision.[109] The court declared that it lacked jurisdiction to hear an appeal of the "interlocutory order" revoking Gottlieb's *pro hac vice* admission to practice in Delaware.[110]

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extensively by newspapers, radio, and television broadcasts as circulation-conscious editors catered to the insatiable interest of the American public in murder, mystery, society, sex, and suspense. *Id.* at 356.

104. *Id.* at 362.

105. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 1 (1994).

106. *See* Kenneth Jost, *Judges Should Gag the Gag Order*, CHRISTIAN SCI. MONITOR, Aug. 5, 1991, at 19.

107. *See* Gottlieb v. State, 697 A.2d 400, 404 (Del. 1997).

108. *See* Matthew Futterman, *Judge in Grossberg Trial Stands His Ground*, STAR-LEDGER (Newark, N.J.), July 9, 1997, at 32.

109. *See* Gottlieb v. State, 697 A.2d 400 (Del. 1997).

110. *See id.* at 400. An interlocutory order is one made during the progresss of a case and does not finally determine the outcome of an action. BLACK'S LAW DICTIONARY 815 (6th ed. 1990).

Pursuant to Article IV, section 11 of the Delaware Constitution, the Delaware Supreme Court has limited jurisdiction over appeals in criminal cases.[111] Interlocutory appeals from criminal cases are not included within the scope of court's jurisdiction.[112] Instead, the Delaware Supreme Court only has jurisdiction over interlocutory appeals from trial court orders in civil actions, those from the Court of Chancery, and Orphans' Court.[113]

Although there is no constitutional right to an appeal,[114] there are numerous benefits to the appeals process. Importantly, appeals operate as safeguards to ensure correct factual and legal decisions.[115] Perhaps more significantly, appeals serve to provide equitable results to parties who would otherwise be bound by unreviewable decisions.[116] These policies are equally applicable to interlocutory appeals.[117]

Arguments disfavoring appeals of interlocutory orders are unavailing when balanced against the benefits of appeal. Standard concerns include increasing the caseload of reviewing courts, diminishing respect for trial level judges by institutionalizing mechanisms to second-guess their decisions, and delaying trial court proceedings.[118] Such concerns are even less substantial when considered in light of a capital punishment case involving the permanent deprivation of a defendant's counsel of choice. A judge's concern for his or her own reputation should yield to a defendant's concern for fairness.

In addition to its claim that it lacked jurisdiction to consider an interlocutory appeal of Judge Ridgely's order, the *Gottlieb* court set forth

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111. *See* DEL. CONST. art. IV, § 11 (1)(b)–(c).

112. *See Gottlieb*, 697 A.2d at 400.

113. *See* DEL. CONST. art. IV, §§ 11 (1)(a), (4), (5).

114. *See* Evits v. Lucey, 469 U.S. 387, 393 (1985).

115. *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1175 (1990).

116. *See id.* (citing J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 799 (1989) (contending that "the justification for appeals is not necessarily the 'correct' result they may produce, but their tendency to encourage reasoned judgment by subjecting it to reexamination")).

117. *See id.*

118. *See id.* at 1178. Mr. Solimine considers these criticisms against interlocutory review unconvincing. First, he suggests that an increase in interlocutory appeals may result in a corresponding decrease in a court system's overall caseload. *See id.* Dispositions of intermediate decisions at the appellate level may lead to quicker resolution of cases at the trial level. *See id.* Various restrictions could also govern the interlocutory process to minimize the impact on valuable judicial resources. For instance, limitations could be imposed on the time allowed for oral arguments and page restrictions for party briefs. *See id.* Second, he points out appeals which affirm trial judge decisions could increase the respect afforded trial judges. *See id.* at 1178–79. Finally, the potential delays engendered by appellate review are worth it if the ultimate benefits of review are achieved. *See id.*

additional reasons supporting its decision not to review the order. Quite troubling, the court noted that nothing about the disqualification order distinguished itself from "the run of pretrial decisions that affect the right of criminal defendants yet must await completion of trial court proceedings for review."[119] Apparently, the court did not place a high premium on Grossberg's right to counsel of choice.

Furthermore, the court averred that the validity of a disqualification could not be adequately reviewed until the completion of the trial.[120] At that point, the effect of the disqualification on the defense would be known.[121] Such reasoning is puzzling. For all the emphasis placed on avoiding delay of trial and conservation of judicial resources, Delaware's interlocutory process, or lack of, is curious. If it were determined, at the conclusion of a trial, that the disqualification did affect the outcome, a mistrial might be entered, and the entire process of trying Grossberg would be repeated.

Similarly, after Judge Ridgely dismissed Gottlieb from the matter, he delayed Grossberg's trial for several months to allow her to retain other counsel.[122] During this time, the Delaware Supreme Court could have rendered a decision as to whether Gottlieb's dismissal was appropriate. If it was deemed improper, Gottlieb could resume representation in the case. If not, the trial would be delayed a few months; not too unlike a party requesting a continuance.

Without any means of appeal, Gottlieb was effectively shut out of the case by the same judge who issued the order and decided there had been a violation. At a minimum, the contempt hearing should have been referred to another judge. However, the Delaware Constitution affords the supreme court one other avenue by which it could have possibly heard Gottlieb's appeal. Article IV, Section 11(9) gives the supreme court jurisdiction "[t]o hear and determine questions of law certified to it by other Delaware courts . . . where it appears to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it."[123] The Delaware Supreme Court has the authority to prescribe the methods of certification and the conditions under which certification would be appropriate.[124] By the terms of this provision, Gottlieb's situation seems

119. *Gottlieb*, 697 A.2d at 402 (citing Flanagan v. United States, 465 U.S. 259, 268–70 (1984)).

120. *See id.*

121. *See id.*

122. See Matthew Futterman, *Judge Delays Grossberg Trial Until May '98: New Jersey Attorneys in Baby-Killing Case Need Time*, STAR-LEDGER (Newark, N.J.), Sept. 4, 1997, at 24.

123. DEL. CONST. art. IV, § 11(9).

124. *See id.*

to be a prime candidate for the supreme court to have considered it for certification. Hearing Gottlieb's appeal certainly qualifies as an "important and urgent" reason deserving immediate determination. Further, the court would be rendering a decision on a question of law: whether the revocation of Gottlieb's *pro hac vice* admission was justified. Nonetheless, the Delaware Supreme Court passed on the opportunity to review Judge Ridgely's order.[125]

Delaware, and states with similar treatment of criminal interlocutory appeals, should take notice of North Carolina legislation allowing appeals that affect a "substantial right" which would be lost absent a review prior to final determination. Essentially, North Carolina implements a two-part test: (1) the right itself must be substantial; and (2) the party's case would potentially suffer in the absence of this right.[126] North Carolina does not base its appeals process on the finality of the interlocutory order.[127] Instead, it looks at whether or not counsel had been properly admitted to practice before the interlocutory order was issued.[128] Once attorneys are properly admitted *pro hac vice*, their clients are deemed to have acquired a substantial right to the continuation of representation by that attorney.[129]

In *Goldston v. American Motors Corp.*,[130] an order revoking counsel's *pro hac vice* admission was reversed because it affected the client's substantial right to continued representation of her counsel of choice. Plaintiff's attorney, R. Ben Hogan, was properly admitted to practice, and was also an alleged expert in the products liability area.[131] The court determined that not allowing the client to be represented by Hogan would be detrimental to her substantial right, largely because of Hogan's expertise and knowledge in the field of automobiles.[132] Mr. Gottlieb's circumstances parallel that of Hogan. He was carefully chosen by the Grossbergs to lead Amy's case, and he had been properly admitted to practice in Delaware. Furthermore, this case involves the death penalty. Conceivably, it can be conceded that Gottlieb's removal and inability to represent Amy would constitute an impairment of a substantial right.

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125. *See* Gottlieb v. State, 697 A.2d 400 (Del. 1997).

126. *See* Goldston v. American Motors Corp., 392 S.E.2d 735 (N.C. 1990) (quoting Wachovia Realty Invs. v. Housing, Inc., 232 S.E.2d 667 (N.C. 1977)).

127. *See id.* at 737.

128. *See id.*

129. *See id.*

130. 392 S.E.2d 735 (N.C. 1990).

131. *See Goldston*, 392 S.E.2d at 737.

132. *See id.*

V. ALTERNATIVE SANCTIONS

As the *Grossberg* matter illustrates, a court's inherent power to punish misconduct by criminal contempt often conflicts with a defendant's Sixth Amendment right to vigorous legal representation.[133] Therefore, a court must balance its need for order and decorum against a defendant's right to vigorous representation.[134] In their attempt to strike this balance, judges must consider the relative weight of these needs, especially when a defendant requires zealous advocacy to stay alive.

A. Background on Contempt

Judges possess great latitude in fixing punishments for violations of their court orders. For instance, to punish improper extrajudicial comments by attorneys, judges may use their contempt of court powers.[135] Punishments include monetary fines, reprimands, suspension, disbarment, and incarceration. Criminal contempt serves a dual purpose. One purpose is to "protect the court's reputation and ability to administer justice."[136] Criminal contempt also serves to punish the wrongdoer for past disobedience of a court order.[137] In contrast, the primary function of civil contempt is to "coerce compliance with a court order."[138]

Federal Rule of Criminal Procedure 42 identifies two types of criminal contempt dispositions. Pursuant to Rule 42(a), a judge may summarily order criminal contempt if the judge observes the objectionable conduct during court.[139] Rule 42(b) allows for a contempt disposition only after

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133. *See* Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, Part I: The Conflict Between Advocacy and Contempt*, 65 WASH L. REV. 477, 477 (1990) [hereinafter Raveson, Part I].

134. *Id.* at 478–80.

135. *See* H. Morley Swingle, *Warning: Pretrial Publicity May Be Hazardous to Your Bar License*, 50 J. MO. B. 335, 337–38 (1994).

136. THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT art. I(A) (ABA Standing Committee on Professional Discipline ed., 1984) [hereinafter JUDICIAL RESPONSE].

137. MANUAL ON RECURRING PROBLEMS IN CRIMINAL TRIALS, FEDERAL JUDICIAL CENTER, 51 (Genevra K. Loveland & Kris Markarian eds., 4th ed. 1996) [hereinafter MANUAL ON RECURRING PROBLEMS].

138. *Id.* Contemnors are not entitled to an indictment or jury trial before civil contempt sanctions are imposed. *See* Shillitani v. United States, 384 U.S. 364, 365 (1996) (providing no right to jury trial or indictment because of conditional nature of civil contempt). Contemnors are entitled to minimal due process protections, such as notice and the opportunity to be heard. *See* James Oleske, *Authority of the Trial Judge*, 84 GEO. L.J. 1179, 1189 (1996).

139. FED. R. CRIM. P. 42(a).

fundamental due process requirements, such as notice and a hearing, are provided to the alleged contemnor.[140]

The process of summary contempt is "reserved for exceptional circumstances" since the alleged contemnor is not afforded fundamental due process requirements.[141] Thus, summary contempt is usually invoked only when immediate action is necessary to "restore order and maintain the dignity and authority of the court."[142] Furthermore, there must be an actual disruption of judicial order before an attorney can be found guilty of summary contempt.[143]

Summary contempt is rarely used because of the various restrictions imposed on its use. Thus, judges rely on Rule 42(b) to punish contemptuous behavior.[144] Common use of 42(b), however, has trivialized the due process protections guaranteed to a defendant. Theoretically, judges must exercise their contempt power with care to avoid arbitrary and oppressive conclusions.[145] Practically, however, the wide discretionary latitude allows judges to order contempt swiftly. Notice of a contempt hearing and an opportunity to be heard at this hearing may technically satisfy the requirements for the record, but the ease with which contempt can be ordered suggests that judges may not really afford defendants due process protections.

It is well established that a judge has the power to suspend an attorney from practice before that court.[146] Such power, however, "ought to be exercised with great moderation and judgment. . . ."[147] In the exercise of his discretion, Judge Ridgely "[chose] to go no further than [a] public reprimand."[148] His public reprimand, however, consisted of dismissing Robert Gottlieb from the case and revoking his *pro hac vice* admission to practice in Delaware.[149]

Robert Gottlieb's conduct in the *Grossberg* case does not parallel, nor even resemble that of Bruce Cutler, the attorney who knowingly and repeatedly acted in blatant disregard of court order. Mr. Gottlieb had not been censured in the past, nor had he been warned. He had been approached

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140. *Id.* 42(b).

141. MANUAL ON RECURRING PROBLEMS, *supra* note 137, at 63.

142. *Id.*

143. *Id.* at 65.

144. *See id.* at 63.

145. *See id.* at 57.

146. *In re* Sarelas, 360 F. Supp. 794, 795 (N.D. Ill. 1973) (suspending an attorney from practice for two years for filing frivolous and defamatory litigation).

147. *Id.* (quoting *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 529–30 (1824)).

148. *See* State v. Grossberg, 705 A.2d 608, 613 (Del. 1997).

149. *See id.*

by *20/20* to do an interview, and like Mr. Gentile, who ultimately was not sanctioned, Mr. Gottlieb proceeded believing he was acting in conformance with the court order. Therefore, Mr. Gottlieb should not have been summarily dismissed from the case.

In fact, there are numerous alternatives Judge Ridgely could have imposed at the contempt proceeding. For example, a monetary fine, which is a common punishment imposed in contempt cases, would have served the purpose of preventing further prejudice to the case. If a monetary fine did not sufficiently deter Mr. Gottlieb from making future public statements, Judge Ridgely could have imposed a jail sentence to commence immediately after his representation of Amy concluded. Also, a disciplinary action against Mr. Gottlieb could have been requested.[150] Thus, there are a myriad of contempt options Judge Ridgely could have used short of the debilitating and highly prejudicial sanction of removing a capital defendant's lead counsel.

B. In the Court's Discretion

Currently, the "ad hoc and sporadic treatment of individual instances of contempt makes the limits [of vigorous advocacy] uncertain, producing substantial self-censorship" of otherwise zealous attorneys.[151] Courts possess a virtually unrestrained power to punish attorneys for contempt, and they frequently exercise this power arbitrarily.[152] Emanating from the amorphous and undefined "substantial likelihood standard," the contempt power is utilized idiosyncratically by judges to enforce whatever subjective level of order, decorum, and respect they deem appropriate.[153] In all

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150. The contempt power is distinguishable from the use of the disciplinary process in that the latter's purpose is to protect the public from lawyers who are unable to "properly discharge their professional duties." JUDICIAL RESPONSE, *supra* note 136, art. I(B)(1.1). Resolutions of disciplinary actions often include suspension and disbarment above and beyond removal from a single case. *See, e.g., Preface to* STANDARDS FOR IMPOSING LAWYER SANCTIONS 10 (ABA ed. 1991).

151. Raveson, Part I, *supra* note 133, at 483.

152. *See* Raveson, Part II, *supra* note 87, at 744.

153. The power of a court to summarily punish any infraction of their orders has ancient origins and is generally deemed vital to independence of the judiciary. A recent study reports, however, that

> [V]iolations of orders against public disclosure committed outside the courtroom . . . should not be dealt with summarily. With respect to punishment, an asserted contempt of court outside the presence of the court, whether the contempt is civil or criminal, should be subject, like defiance of any other duly constituted authority, to indictment and to trial, preferably by jury, before a judge wholly uninvolved in the controversy.

RIGHTS IN CONFLICT: REPORT OF THE TWENTIETH CENTURY FUND, TASK FORCE ON JUSTICE, PUBLICITY, AND THE FIRST AMENDMENT 21 (1976) (emphasis removed).

likelihood, the disposition of one matter may turn on the mood of the judge during that particular court session. This use of the contempt power, and even the threat of its use, have a potential chilling effect on lawyers' advocacy.[154] For fear of being held in contempt, lawyers may censor themselves at the expense of their clients. Alternatively, lawyers may, in the course of advocating their client's interests, be literally prevented from representing their clients, as was Mr. Gottlieb who got dismissed from the *Grossberg* case. Therefore, ill-considered use of the contempt power ultimately manifests as an obstacle to the court's ability to fairly administer justice. This is because judicial action which curtails the vigorousness of counsel is likely to prejudice the rights of criminal defendants and impermissibly tilt the scales of justice.[155]

C. Guidelines for Imposing Sanctions

Courts tend to apply the age-old balancing test between the court's need for decorum and respect with the client's need for vigorous advocacy. However, a purely ad hoc approach to this balancing results in unacceptably arbitrary and unpredictable impositions of sanctions for gag order violations. Clearer guidelines are needed to prevent abuses of judicial discretion and an undue chilling effect of vigorous advocacy. The factually driven analyses of determining whether or not contempt was committed in a particular case has infected this area of the law with an arbitrariness that often borders on discretionary abuse.[156] Even courts which recognize the value of advocative expression and the need to minimize the chilling effect on vigorous representation have failed to develop any meaningful mechanism for handling contempt cases. Instead, some courts continue to take advantage of the broad discretion they possess in this area. Although the power of lower courts to fashion remedies for contempt is limited to sanctions narrowly tailored to achieve the proposed end, many courts are faltering in this responsibility.[157]

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154. *See* Raveson, Part I, *supra* note 133, at 487.

155. *See id.* at 489–90.

156. Raveson, Part II, *supra* note 87, at 769. Legal experts noted that Ridgely might not have imposed the ultimate sanction if Gottlieb had shown remorse for allowing the interview. Doug Most, *Grossberg Begs for Return of Lawyer*, RECORD (Bergen County, N.J.), July 8, 1997, at A1. Instead of apologizing for allowing the interview, Gottlieb maintained he was unaware of the gag order in effect. *See id.*

157. *See* United States v. Wilson, 421 U.S. 309, 319 (1975) (adhering to the principle that "only '[t]he least possible power adequate to the end proposed' should be used in contempt cases") (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).

The current confusion in this area suggests that the time has arrived for the Supreme Court to address this dilemma and provide courts with more guidance. Accepting an appeal of Mr. Gottlieb's case would provide them with a concrete foundation from which to begin.

The Supreme Court should attempt to formulate a clear and unambiguous definition of the "substantial likelihood standard" to lend objectivity to the contempt process establish a uniform interpretation throughout the lower courts of all the States. The Court should also impose stricter requirements for judges to satisfy before they can issue gag orders. For example, a court may grant a continuance of a case to allow the initial horror of a crime and intense emotions to diminish over time. In cases where gag orders are appropriate, there should be an additional requirement that the order specify what punishments may be imposed upon violation, thus reserving to the courts the option to summarily remove counsel for an initial, yet particularly egregious violation. Finally, appeals from criminal contempt charges should be adjudicated before a judge other than the one presiding when the misconduct occurred or the judge whose order was violated.

Even considering these guidelines, application of the contempt power with great precision is likely to remain uncertain. The variables involved are numerous and probably impossible to recount exhaustively. Although it remains difficult for an attorney to know with certainty whether specific behavior will be deemed contemptuous, zealous representation can only be shielded from the court's arbitrary power, unless the Court fashions a safe harbor, similar to the one provided in revised Model Rule 3.6, for necessary advocative expression.[158] Thus, a procedure permitting criminal interlocutory appeals should be implemented as a check on trial judges' use of their contempt power. Recognizing the disadvantages associated with interlocutory appeals, such as the potential conflict with speedy resolution of criminal cases, a narrow exception can be made with regard to capital punishment cases.

VI. CONCLUSION

Until the Supreme Court takes action, it is imperative that the lower courts rethink the parameters of their role in the trial process. They should be mindful of two things. First, defendants, especially capital defendants ignorant of the law, should not be punished for their attorneys' misconduct. Certainly, Amy and her family would not have granted the *20/20* interview if

158. *Id.* at 837.

they had known that it would adversely affect her cause.[159] They should not be charged with the same knowledge as their attorney.

Second, judges should keep in mind that arbitrary use of the contempt power as a means to command respect for the courts has the potential to backfire.[160] Instead of generating respect for the courts, disrespect is certain to follow if the public realizes that the judiciary's demand for decorum stifles zealous representation on behalf of defendants.[161] Ultimately, the legitimacy of the entire criminal process will suffer.[162]On April 22, 1998, less than two weeks before her trial was to begin, Amy Grossberg pleaded guilty to manslaughter.[163] Thus, we are left to wonder whether she would have faced a trial on the merits had Mr. Gottlieb continued as her lead attorney. Citing Judge Ridgely's gag order, prosecutors and Grossberg's lawyers refused to confirm or deny her plea bargain.[164]

*Loretta S. Yuan**

159. Amy pleaded to the court to reconsider its decision to dismiss Gottlieb. She wrote, in a sworn statement that "[i]f I thought I would be violating a court order by appearing on '20/20,' I would not have spoken on the television program. Further, if I thought that my appearance would cause this court to take away my lawyer, I would never have risked such an action." Most, *supra* note 156, at A1. Her parents also wrote to the court, stating they were unaware of the speech restrictions in their daughter's case. *See id.*

160. *See* Raveson, Part II, *supra* note 87, at 563–64.

161. *See id.*

162. *See id.*

163. *Teen Mom Said Set to Plead Guilty in Death of Child*, L.A. TIMES, Apr. 22, 1998, at A14.

164. *See id.*

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